**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2009 MSPB 223**

Docket No. DC-0752-09-0478-I-1
DC-0432-09-0477-R-1

**Ramona Williams,**

**Appellant,**

**v.**

**Department of Health and Human Services,**

**Agency.**

November 2, 2009

Ramona Williams, Gaithersburg, Maryland, pro se.

Clayton G. Brewer, Rockville, Maryland, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

## OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed her involuntary retirement claim. For the reasons set forth below, we DENY the appellant's petition, REOPEN the case on the Board's own motion, and JOIN the case with the appellant's concurrent removal appeal, *Williams v. Department of Health & Human Services*, MSPB Docket No. DC-0432-09-0477-

I-1, which we also REOPEN.[1] We VACATE both initial decisions and DISMISS the joined appeal for lack of Board jurisdiction.

## BACKGROUND

¶2 By notice dated August 15, 2007, the agency proposed to remove the appellant from her position of Social Worker, GS-0185-13, on charges of Failure to Maintain Acceptable Performance, Failure to Follow a Directive, Inappropriate Behavior, and Failure to Follow Established Leave Requesting Procedures Resulting in AWOL. Initial Appeal File (IAF), Tab 1. By letter dated September 24, 2007, the agency informed the appellant of its decision to remove her from the service, effective the following day. IAF, Tab 3. On September 25, 2007, the effective date of her removal, the appellant retired. IAF, Tab 1.

¶3 On October 24, 2007, the appellant, who was at that time represented by counsel, filed a timely appeal of her removal. However, on January 16, 2008, the parties entered into a settlement agreement under which the agency agreed to make certain lump-sum payments to the appellant in consideration for withdrawal of her pending Board and equal employment opportunity claims. The appellant further agreed to the following:

> Ms. Williams agrees to not initiate or pursue any complaints, grievances, requests for investigation, claims under other administrative procedures, appeals, or lawsuits against the agency … under the Civil Service Reform Act of 1978, as amended; Title VII of the Civil Rights Act of 1978, as amended; the Whistleblower Protection Act, as amended; the Age Discrimination in Employment Act, as amended; the Constitution of the United States; any other state or federal law or regulation; or the common law; with respect to any action raised in her employment claims filed against the Agency as of the effective date of this agreement.

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[1] The Board may reopen an appeal and reconsider an initial decision at any time. 5 C.F.R. § 1201.118. We find that joining the two appeals will expedite the processing of the cases and will not adversely affect either party. *See* 5 U.S.C. § 7701(f); 5 C.F.R. § 1201.36.

IAF, Tab 5. The administrative judge (AJ) then assigned to the case dismissed the appeal as settled and entered the agreement into the record for enforcement purposes. *See Williams v. Department of Health & Human Services*, MSPB Docket No. DC-0752-08-0066-I-1 (Initial Decision, Jan. 25, 2008).

¶4 On April 20, 2009, the appellant, now proceeding pro se, filed a new appeal form with the Board. IAF, Tab 1. In the cover letter, the appellant characterized the submission as a "request for appeal of a removal," and on the appeal form she indicated that the date of the action was September 25, 2007. She checked the box indicating that she was appealing a removal action, but also the box indicating that she was appealing an involuntary retirement. In the narrative portions of the appeal form, the appellant alleged various acts of "fear, intimidation [and] harassment," and stated that she wanted "a decision on the appropriateness of the methods used to fire me & force me into retirement after filing an EEO." *Id*. She further alleged that she was given assignments outside her position description and did not receive a timely performance evaluation. *Id*. The appellant also enclosed a copy of the August 15, 2007 notice of proposed removal. *Id*.

¶5 The case was assigned to a new AJ, who docketed the removal and involuntary retirement claims as two separate appeals. The agency moved to dismiss both claims for lack of jurisdiction based on the waiver provision of the settlement agreement or, in the alternative, res judicata or laches. IAF, Tab 5; *see also Williams*, MSPB Docket No. DC-0432-0477-I-1.[2] On May 21, 2009, the AJ dismissed the involuntary retirement claim for lack of jurisdiction, finding that the appellant had failed to make even a non-frivolous allegation that her

[2] The agency also filed a petition for enforcement of the January 16, 2008 settlement agreement, contending that the appellant had breached the agreement by again contesting her removal. *Williams v. Department of Health & Human Services*, MSPB Docket No. DC-0752-08-0066-I-1. The case is pending in the Washington Regional Office.

retirement was coerced. IAF, Tab 6. In a separate initial decision, the AJ dismissed the appellant's removal claim for lack of jurisdiction, citing the doctrine of res judicata. *Williams*, MSPB Docket No. DC-0432-09-0477-I-1 (Initial Decision, May 21, 2009).[3]

¶6 The appellant then filed a petition for review, citing the docket number of the initial decision that dismissed her involuntary retirement claim. Petition for Review File (PFRF), Tab 3. In her petition, she asserts that the AJ erred in finding that her retirement was voluntary, because that determination "did not take into account the petitioner's removal at the time of her retirement." *Id*. at 2. She further explains:

> The initial decision refers to the petitioner's being forced to retire following the agency's proposed removal action against her. It also discusses resignations based on adverse and harsh working conditions. Although the agency did issue a proposal of removal and the agency's conditions were beyond deplorable this was not the ultimate reason petitioner retired. The petitioner retired because there was an actual removal and based on the removal, it would not be expected by a reasonable person that the petitioner could possibly remain in her position under any circumstances.

*Id*. at 2-3. The appellant further contends that the question of whether her retirement was voluntary lies outside the scope of the settlement agreement that

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[3] Prior to the initial decision in that case, the appellant submitted a letter to the regional office, in which she stated that, based on the acknowledgment order, she "believe[d] that filing directly with MSPB would not be the appropriate procedure," and was "therefore requesting that you disregard the previous request for a hearing." *Williams*, MSPB Docket No. DC-0432-09-0477-I-1. The AJ found that it was unclear whether the appellant intended to withdraw her appeal, as opposed to just the hearing, and proceeded to adjudicate the removal claim based on the written record. *Id*. On petition for review, the appellant states that her intent was to withdraw her appeal, but we agree with the AJ that the letter as written was ambiguous. *See Page v. Department of Transportation*, 110 M.S.P.R. 492, ¶ 5 (2009) (voluntary withdrawal of an appeal must be "clear, decisive, and unequivocal"). In any event, it appears the appellant now wishes to pursue her appeal. *See* PFRF, Tab 3.

resolved her October 24, 2007 appeal, and that res judicata therefore does not apply. *Id*. at 3. The agency has filed a response. PFRF, Tab 5.

## ANALYSIS

The AJ erred in adjudicating the appellant's involuntary retirement claim.

¶7 Where, as here, an agency decides to remove an employee, and the employee retires on the date the removal was to become effective, the employee does not on that account lose the right to file a Board appeal contesting the decided removal. 5 U.S.C. § 7701(j); *Mays v. Department of Transportation*, 27 F.3d 1577, 1579-81 (Fed. Cir. 1994); *Norton v. Department of Veterans Affairs*, 112 M.S.P.R. 248, ¶ 2 (2009). In such a case, however, the Board will not address whether the appellant's retirement was involuntary. *Krawchuk v. Department of Veterans Affairs*, 94 M.S.P.R. 641, ¶ 7 (2003); *Scalese v. Department of the Air Force*, 68 M.S.P.R. 247, 249 (1995). As we explained in *Scalese*, if the agency is unable to support its removal decision, then the appellant is entitled to all the relief she could receive if she could show that her retirement was coerced, and the involuntary retirement claim would thereby be mooted. 68 M.S.P.R. at 249. Conversely, if the agency is able to show that it properly decided to remove the appellant, then she could not show that her retirement was involuntary based on the threat of the removal action. *Id*.; *see also Schultz v. U.S. Navy*, 810 F.2d 1133, 1136-37 (Fed. Cir. 1987) (that an employee is faced with the unpleasant choice of either resigning or opposing a potential removal action does not render the resulting resignation involuntary; rather, the resignation is involuntary only if the agency knew that the reason for the threatened removal could not be substantiated).[4]

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[4] Moreover, even if it were possible for the appellant to lose her removal appeal yet show that her retirement was involuntary, she could neither be reinstated nor receive back pay, because there was no gap in time between her retirement and the effective date of her removal. *Cf. Sink v. Department of Energy*, 110 M.S.P.R. 153, ¶ 22 (2008) (where the agency proposed but did not decide to remove the appellant for failure to

¶8 Thus, it was error for the AJ to adjudicate the appellant's involuntary retirement claim as a matter distinct from her removal. Because the claims should not have been docketed separately, we now rejoin them as a single appeal of the September 25, 2007 removal action. *See* 5 U.S.C. § 7701(f) (Board may join two or more appeals by the same appellant if it believes the action could expedite processing of the appeals and would not adversely affect either party). In doing so, we are mindful that neither party petitioned for review of the initial decision in *Williams*, MSPB Docket No. DC-0432-09-0477-I-1, and that, as a result, the decision has become final. Nevertheless, the Board has discretion to reopen an appeal and reconsider an AJ's decision on its own motion at any time. 5 C.F.R. § 1201.118. In deciding whether to reopen a case, the Board will balance the desirability of finality and the public interest in reaching what ultimately appears to be the correct result. *Shannon v. Department of Homeland Security*, 100 M.S.P.R. 629, ¶ 18 (2005). Here, because the two April 20, 2009 appeals are in fact identical, we cannot correct the disposition of one without also revisiting the other. We therefore find that, under the unique circumstances of this case, it is appropriate to reopen both docket numbers for consideration as a single appeal.

The doctrine of res judicata does not apply.

¶9 The appellant is correct in her assertion that res judicata does not apply, although not for the reason she states. Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995). When the merits of an agency action are not examined, however, the doctrine of res judicata is inapplicable. *Vargo v. U.S.*

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accept a directed reassignment pursuant to an agency reorganization that abolished his position, and the appellant established that his retirement was involuntary based on agency misinformation, relief order was limited to the period between the appellant's retirement and the date of his inevitable separation).

*Postal Service*, 62 M.S.P.R. 156, 159 (1994). In the case at hand, the appellant's original removal appeal, *Williams*, MSPB Docket No. DC-0752-08-0066-I-1, was settled without examining the merits of the removal action. Therefore, contrary to the initial decision in *Williams*, MSPB Docket No. DC-0432-09-0477-I-1, the instant removal appeal is not barred by res judicata. *See Brown v. Department of the Navy*, 102 M.S.P.R. 377, ¶ 12 (2006); *Besemer v. U.S. Postal Service*, 77 M.S.P.R. 260, 264 (1998); *Vargo*, 62 M.S.P.R. at 159.

The appeal is dismissed for lack of jurisdiction, based on the waiver provision of the January 16, 2008 settlement agreement.

¶10 An appellant's waiver of appeal rights in a settlement agreement is enforceable and not against public policy if the terms of the waiver are comprehensive, freely made, and fair, and the execution of the waiver was not the result of duress or bad faith on the part of the agency. *Lawrence v. Office of Personnel Management*, 108 M.S.P.R. 325, ¶ 6, *aff'd*, 318 F. App'x 895 (Fed. Cir. 2008). A waiver of appeal rights that meets these criteria divests the Board of jurisdiction over an appeal. *Id*. An appellant may establish that the Board has jurisdiction over an action taken pursuant to the terms of a settlement agreement wherein she agreed to waive her appeal rights if she can establish that the settlement agreement was invalid due to fraud, duress, coercion, or misrepresentation by the agency. *Id*.

¶11 The appellant does not challenge the validity of the January 16, 2008 settlement agreement, but instead contends that her alleged involuntary retirement lies outside the scope of that agreement. However, as discussed above, the only matter properly before us is the September 25, 2007 removal action, which the appellant has plainly waived her right to appeal before the Board. *See id*., ¶ 7 (waiver provision in settlement agreement precluded new appeal concerning the same survivor annuity benefit at issue in settled appeal). We therefore dismiss the instant appeal for lack of jurisdiction.

## ORDER

¶12 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

## NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.